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9 **IN THE UNITED STATES DISTRICT COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION**

11 AYL A, LLC, a Delaware Limited
12 Liability Company,
13 Plaintiff,

14 v.

15 ALYA SKIN PTY. LTD., an Australian
Private Company,
16 Defendant.

No. 4:19-cv-00679 HSG

PROTECTIVE ORDER

17
18 Pursuant to a Stipulation by all parties, the following protective order is hereby
19 entered in this matter.

20 **1. PURPOSES AND LIMITATIONS**

21 Disclosure and discovery activity in this action are likely to involve production
22 of confidential, proprietary, or private information for which special protection from
23 public disclosure and from use for any purpose other than prosecuting, defending and
24 attempting to settle this litigation may be warranted. Accordingly, the parties
25 stipulate to entry of this Protective Order. The parties acknowledge that this Order
26 does not confer blanket protections on all disclosures or responses to discovery and
27 that the protection it affords from public disclosure and use extends only to the
28 limited information or items that are entitled to confidential treatment under the

1 applicable legal principles. The parties further acknowledge, as set forth in Section
 2 11.3, below, that this Stipulated Protective Order does not entitle them to file
 3 confidential information under seal; Civil Local Rule 79-5 sets forth the procedures
 4 that must be followed and the standards that will be applied when a party seeks
 5 permission from the court to file material under seal.

6 **2. DEFINITIONS**

7 **2.1 Challenging Party:** a Party or Non-Party that challenges the
 8 designation of information or items under this Order.

9 **2.2 “CONFIDENTIAL” Information or Items:** information (regardless
 10 of how it is generated, stored or maintained) or tangible things that qualify for
 11 protection under Federal Rule of Civil Procedure 26(c).

12 **2.3 Counsel (without qualifier):** Outside Counsel of Record and House
 13 Counsel (as well as their support staff).

14 **2.4 Designating Party:** a Party or Non-Party that designates information
 15 or items that it produces in disclosures or in responses to discovery as
 16 “CONFIDENTIAL.”

17 **2.5 Disclosure or Discovery Material:** all items or information, regardless
 18 of the medium or manner in which it is generated, stored, or maintained (including,
 19 among other things, testimony, transcripts, and tangible things), that are produced or
 20 generated in disclosures or responses to discovery in this matter.

21 **2.6 Expert:** a person with specialized knowledge or experience in a matter
 22 pertinent to the litigation who has been retained by a Party or its counsel to serve as
 23 an expert witness or as a consultant in this action.

24 **2.7 House Counsel:** attorneys who are employees of a party to this action.
 25 House Counsel does not include any outside counsel.

26 **2.8 Non-Party:** any natural person, partnership, corporation, association,
 27 or other legal entity not named as a Party to this action.

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1 **2.9 Outside Counsel of Record:** attorneys who are not employees of a
 2 party to this action but are retained to represent or advise a party to this action and
 3 have appeared in this action on behalf of that party or are affiliated with a law firm
 4 which has appeared on behalf of that party.

5 **2.10 Party:** any party to this action, including all of its officers, directors,
 6 employees, consultants, retained experts, and Outside Counsel of Record (and their
 7 support staffs).

8 **2.11 Producing Party:** a Party or Non-Party that produces Disclosure or
 9 Discovery Material in this action.

10 **2.12 Professional Vendors:** persons or entities that provide litigation
 11 support services (*e.g.*, photocopying, videotaping, translating, preparing exhibits or
 12 demonstrations, and organizing, storing, or retrieving data in any form or medium)
 13 and their employees and subcontractors.

14 **2.13 Protected Material:** any Disclosure or Discovery Material that is
 15 designated as “CONFIDENTIAL.”

16 **2.14 Receiving Party:** a Party that receives Disclosure or Discovery
 17 Material from a Producing Party.

18 **3. SCOPE**

19 The protections conferred by this Order cover not only Protected Material (as
 20 defined above), but also (1) any information copied or extracted from Protected
 21 Material; (2) all copies, excerpts, summaries, or compilations of Protected Material;
 22 and (3) any testimony, conversations, or presentations by Parties or their Counsel that
 23 might reveal Protected Material. However, the protections conferred by this Order
 24 do not cover the following information: (a) any information that is in the public
 25 domain at the time of disclosure to a Receiving Party or becomes part of the public
 26 domain after its disclosure to a Receiving Party as a result of publication not
 27 involving a violation of this Order, including becoming part of the public record
 28 through trial or otherwise; and (b) any information known to the Receiving Party

1 prior to the disclosure or obtained by the Receiving Party after the disclosure from a
2 source who obtained the information lawfully and under no obligation of
3 confidentiality to the Designating Party. Any use of Protected Material at trial shall
4 be governed by a separate agreement or order.

5 **4. DESIGNATING PROTECTED MATERIAL**

6 **4.1 Exercise of Restraint and Care in Designating Material for**
7 **Protection.** Each Party or Non-Party that designates information or items for
8 protection under this Order must take care to limit any such designation to specific
9 material that qualifies under the appropriate standards. The Designating Party must
10 designate for protection only those parts of material, documents, items, or oral or
11 written communications that qualify – so that other portions of the material,
12 documents, items, or communications for which protection is not warranted are not
13 swept unjustifiably within the ambit of this Order.

14 Mass, indiscriminate, or routinized designations are prohibited. Designations
15 that are shown to be clearly unjustified or that have been made for an improper
16 purpose (*e.g.*, to unnecessarily encumber or retard the case development process or
17 to impose unnecessary expenses and burdens on other parties) expose the
18 Designating Party to sanctions.

19 If it comes to a Designating Party's attention that information or items that it
20 designated for protection do not qualify for protection that Designating Party must
21 promptly notify all other Parties that it is withdrawing the mistaken designation.

22 **4.2 Manner and Timing of Designations.** Except as otherwise provided
23 in this Order (*see, e.g.*, second paragraph of section 5.2(a) below), or as otherwise
24 stipulated or ordered, Disclosure or Discovery Material that qualifies for protection
25 under this Order must be clearly so designated before the material is disclosed or
26 produced.

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1 Designation in conformity with this Order requires:

2 For information in documentary form (*e.g.*, paper or electronic
3 documents, but excluding transcripts of depositions or other pretrial or
4 trial proceedings), that the Producing Party affix the legend
5 “CONFIDENTIAL” to each page that contains protected material. If
6 only a portion or portions of the material on a page qualifies for
7 protection, the Producing Party also must clearly identify the protected
8 portion(s) (*e.g.*, by making appropriate markings in the margins). A
9 Party or Non-Party that makes original documents or materials available
10 for inspection need not designate them for protection until after the
11 inspecting Party has indicated which material it would like copied and
12 produced. During the inspection and before the designation, all of the
13 material made available for inspection shall be deemed
14 “CONFIDENTIAL.” After the inspecting Party has identified the
15 documents it wants copied and produced, the Producing Party must
16 determine which documents, or portions thereof, qualify for protection
17 under this Order. Then, before producing the specified documents, the
18 Producing Party must affix the “CONFIDENTIAL” legend to each page
19 that contains Protected Material. If only a portion or portions of the
20 material on a page qualifies for protection, the Producing Party also
21 must clearly identify the protected portion(s) (*e.g.*, by making
22 appropriate markings in the margins).

23 For testimony given in deposition or in other pretrial proceedings,
24 that the Designating Party identify on the record, before the close of the
25 deposition, hearing, or other proceeding, all protected testimony.

26 For information produced in some form other than documentary
27 and for any other tangible items, that the Producing Party affix in a
28 prominent place on the exterior of the container or containers in which

the information or item is stored the legend “CONFIDENTIAL.” If only a portion or portions of the information or item warrant protection, the Producing Party, to the extent practicable, shall identify the protected portion(s).

4.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to designate qualified information or items does not, standing alone, waive the Designating Party’s right to secure protection under this Order for such material. Upon timely correction of a designation, the Receiving Party must make reasonable efforts to assure that the material is treated in accordance with the provisions of this Order.

5. CHALLENGING CONFIDENTIALITY DESIGNATIONS

5.1 Timing of Challenges. Any Party or Non-Party may challenge a designation of confidentiality at any time. Unless a prompt challenge to a Designating Party’s confidentiality designation is necessary to avoid foreseeable, substantial unfairness, unnecessary economic burdens, or a significant disruption or delay of the litigation, a Party does not waive its right to challenge a confidentiality designation by electing not to mount a challenge promptly after the original designation is disclosed.

5.2 Meet and Confer. The Challenging Party shall initiate the dispute resolution process by providing written notice of each designation it is challenging and describing the basis for each challenge. To avoid ambiguity as to whether a challenge has been made, the written notice must recite that the challenge to confidentiality is being made in accordance with this specific paragraph of the Protective Order. The parties shall attempt to resolve each challenge in good faith and must begin the process by conferring directly (in voice to voice dialogue; other forms of communication are not sufficient) within 14 days of the date of service of notice. In conferring, the Challenging Party must explain the basis for its belief that the confidentiality designation was not proper and must give the Designating Party

1 an opportunity to review the designated material, to reconsider the circumstances,
 2 and, if no change in designation is offered, to explain the basis for the chosen
 3 designation. A Challenging Party may proceed to the next stage of the challenge
 4 process only if it has engaged in this meet and confer process first or establishes that
 5 the Designating Party is unwilling to participate in the meet and confer process in a
 6 timely manner.

7 **5.3 Judicial Intervention.** If the Parties cannot resolve a challenge without
 8 court intervention, the Challenging Party shall file and serve a motion to remove the
 9 confidentiality designation under Civil Local Rule 37 (and in compliance with Civil
 10 Local Rule 79-5, if applicable) within 21 days of the initial notice of challenge or
 11 within 14 days of the parties agreeing that the meet and confer process will not
 12 resolve their dispute, whichever is earlier. Each such motion must be accompanied
 13 by a competent declaration affirming that the movant has complied with the meet and
 14 confer requirements imposed in the preceding paragraph. Failure by the Challenging
 15 Party to make such a motion including the required declaration within 21 days (or 14
 16 days, if applicable) shall automatically waive the objection for each challenged
 17 designation.

18 The burden of persuasion in any such challenge proceeding shall be on the
 19 Designating Party. Frivolous challenges, and those made for an improper purpose
 20 (*e.g.*, to harass or impose unnecessary expenses and burdens on other parties) may
 21 expose the Challenging Party to sanctions. Until a motion challenging the
 22 confidentiality designation has been decided by the court, all parties shall continue
 23 to afford the material in question the level of protection to which it is entitled under
 24 the Producing Party's designation until the court rules on the challenge.

25 **6. ACCESS TO AND USE OF PROTECTED MATERIAL**

26 **6.1 Basic Principles.** A Receiving Party may use Protected Material that is
 27 disclosed or produced by another Party, or by a Non-Party who agrees to be bound
 28 by this Order, in connection with this case only for prosecuting, defending, or

1 attempting to settle this litigation. Confidential documents may not be used in any
2 other action.

3 Protected Material may be disclosed only to the categories of persons and
4 under the conditions described in this Order. When the litigation has been
5 terminated, a Receiving Party must comply with the provisions of section 12 below
6 (DURATION AND FINAL DISPOSITION).

7 Protected Material must be stored and maintained by a Receiving Party at a
8 location and in a secure manner that ensures that access is limited to the persons
9 authorized under this Order.

10 **6.2 Disclosure of “CONFIDENTIAL” Information or Items.** Unless
11 otherwise ordered by the court or permitted in writing by the Designating Party, a
12 Receiving Party may disclose any information or item designated
13 “CONFIDENTIAL” only to:

14 (a) the Receiving Party’s Outside Counsel of Record in this action,
15 as well as employees of said Outside Counsel of Record to whom it is reasonably
16 necessary to disclose the information for this litigation;

17 (b) the officers, directors, and employees (including House Counsel)
18 of the Receiving Party to whom disclosure is reasonably necessary for this litigation
19 and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit
20 A);

21 (c) Experts (as defined in this Order) of the Receiving Party to whom
22 disclosure is reasonably necessary for this litigation and who have signed the
23 “Acknowledgment and Agreement to Be Bound” (Exhibit A);

24 (d) the court and its personnel;

25 (e) court reporters and their staff, professional jury or trial
26 consultants, mock jurors, and Professional Vendors to whom disclosure is reasonably
27 necessary for this litigation;

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(f) witnesses in the action during their depositions if they have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A), unless otherwise agreed by the Designating Party or ordered by the court. Pages of transcribed deposition testimony or exhibits to depositions that reveal Protected Material must be separately bound by the court reporter and may not be disclosed to anyone except as permitted under this Stipulated Protective Order.

(g) the author or recipient of a document containing the information or a custodian or other person who otherwise possessed or knew the information.

7. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER LITIGATION

If a Party is served with a subpoena or a court order issued in other litigation that compels disclosure or is required to produce pursuant to the initial disclosure requirement of the FRCP 26(a), any information or items designated in this action as “CONFIDENTIAL,” that Party must:

(a) promptly notify in writing the Designating Party. Such notification shall include a copy of the subpoena or court order;

(b) promptly notify in writing the party who caused the subpoena or order to issue in the other litigation that some or all of the material covered by the subpoena or order is subject to this Protective Order. Such notification shall include a copy of this Stipulated Protective Order; and cooperate with respect to all reasonable procedures sought to be pursued by the Designating Party whose Protected Material may be affected.

(c) If no objection is received and no motion is filed by the Designating Party, the Party may thereafter produce the documents so long as it:

(i) redacts the information it deems would be considered confidential by the Non-Party prior to disclosure;¹ and

¹ The purpose of this provision is to keep Parties from violating the privacy interests of Non- Parties and further, ensuring that Non-Parties do not have cause to bring suit asserting such violations.

1 (ii) designate those parts of the materials, documents, items, or oral
2 or written communications as “CONFIDENTIAL”;

3 Any Party or Non-Party may challenge the redaction of information and/or
4 designation of confidentiality, delineated in part (d) of this section, by following the
5 procedures set forth in section 5 (CHALLENGING CONFIDENTIALITY
6 DESIGNATIONS).

7 If the Designating Party timely seeks a protective order, the Party served with
8 the subpoena or court order shall not produce any information designated in this
9 action as “CONFIDENTIAL” before a determination by the court from which the
10 subpoena or order issued, unless the Party has obtained the Designating Party’s
11 permission. The Designating Party shall bear the burden and expense of seeking
12 protection in that court of its confidential material – and nothing in these provisions
13 should be construed as authorizing or encouraging a Receiving Party in this action to
14 disobey a lawful directive from another court.

15 **8. A NON-PARTY’S PROTECTED MATERIAL SOUGHT TO BE**
16 **PRODUCED IN THIS LITIGATION**

17 (a) The terms of this Order are applicable to information produced by a
18 Non- Party in this action who agrees to be bound by this Order and designated as
19 “CONFIDENTIAL.” Such information produced by Non-Parties in connection with
20 this litigation is protected by the remedies and relief provided by this Order. Nothing
21 in these provisions should be construed as prohibiting a Non-Party from seeking
22 additional protections.

23 (b) In the event that a Party is required, by a valid discovery request, to
24 produce a Non-Party’s confidential information in its possession, and the Party is
25 subject to an agreement with the Non-Party not to produce the Non-Party’s
26 confidential information, then the Party shall:

1 (i) promptly notify in writing the Requesting Party and the Non-
 2 Party that some or all of the information requested is subject to a confidentiality
 3 agreement with a Non-Party;

4 (ii) promptly provide the Non-Party with a copy of the Stipulated
 5 Protective Order in this litigation, the relevant discovery request(s), and a reasonably
 6 specific description of the information requested; and make the information
 7 requested available for inspection by the Non-Party.

8 (c) A party may only produce a Non-Party's confidential information with
 9 the Non-Party's consent. If the non-party does not give consent, the requesting party
 10 can then move to compel production of that confidential information. Absent a court
 11 order, the confidential information of a Non-Party cannot be produced without the
 12 consent of that Non-Party.

13 **9. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL**

14 If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed
 15 Protected Material to any person or in any circumstance not authorized under this
 16 Stipulated Protective Order, the Receiving Party must immediately (a) notify in
 17 writing the Designating Party of the unauthorized disclosures, (b) use its best efforts
 18 to retrieve all unauthorized copies of the Protected Material, (c) inform the person or
 19 persons to whom unauthorized disclosures were made of all the terms of this Order,
 20 and (d) request such person or persons to execute the "Acknowledgment and
 21 Agreement to Be Bound" that is attached hereto as Exhibit A.

22 **10. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE** 23 **PROTECTED MATERIAL**

24 When a Producing Party gives notice to Receiving Parties that certain
 25 inadvertently produced material is subject to a claim of privilege or other protection,
 26 the obligations of the Receiving Parties are those set forth in Federal Rule of Civil
 27 Procedure 26(b)(5)(B). This provision is not intended to modify whatever procedure
 28 may be established in an e-discovery order that provides for production without prior

1 privilege review. Pursuant to Federal Rule of Evidence 502(d) and (e), insofar as the
 2 parties reach an agreement on the effect of disclosure of a communication or
 3 information covered by the attorney-client privilege or work product protection, the
 4 parties may incorporate their agreement in the stipulated protective order submitted
 5 to the court.

6 **11. MISCELLANEOUS**

7 **11.1 Right to Further Relief.** Nothing in this Order abridges the right of
 8 any person to seek its modification by the court in the future.

9 **11.2 Right to Assert Other Objections.** No Party waives any right it
 10 otherwise would have to object to disclosing or producing any information or item
 11 on any ground not addressed in this Stipulated Protective Order. Similarly, no Party
 12 waives any right to object on any ground to use in evidence of any of the material
 13 covered by this Protective Order.

14 **11.3 Filing Protected Material.** Without written permission from the
 15 Designating Party or a court order secured after appropriate notice to all interested
 16 persons, a Party may not file in the public record in this action any Protected Material.
 17 A Party that seeks to file under seal any Protected Material must comply with Civil
 18 Local Rule 79-5.1. Protected Material may only be filed under seal pursuant to a
 19 court order authorizing the sealing of the specific Protected Material at issue.
 20 Pursuant to Civil Local Rule 79-5.1, a sealing order will issue only upon a request
 21 establishing that the Protected Material at issue is privileged, protectable as a trade
 22 secret, or otherwise entitled to protection under the law.

23 **11.4 Not An Admission.** Complying with the terms of this Protective Order
 24 shall not: (a) operate as an admission by any party that any particular document,
 25 material or information contains or reflects currently valuable proprietary or
 26 commercial information; or (b) prejudice in any way the right of a party at any time:
 27 (i) to seek a determination by the Court of whether any particular document, item of
 28 material or piece of information should be subject to the terms of this Protective


1 Order, or (ii) to seek relief on appropriate notice from any provision(s) of this
2 Protective Order, either generally or as to any particular document, item of material
3 or piece of information.

4 **12. DURATION AND FINAL DISPOSITION**

5 As used in this subdivision, “all Protected Material” includes all copies,
6 abstracts, compilations, summaries, and any other format reproducing or capturing
7 any of the Protected Material. Following final disposition, each Party’s counsel of
8 record is authorized to either (1) continue to maintain the Protected Material in a
9 confidential manner; (2) return the Protected Material to the Producing Party; or (3)
10 destroy the Protected Material. Final disposition shall be deemed to be the later of
11 (1) dismissal of all claims and defenses in this action, with or without prejudice; and
12 (2) final judgment herein after the completion and exhaustion of all appeals,
13 rehearings, remands, trials, or reviews of this action, including the time limits for
14 filing any motions or applications for extension of time pursuant to applicable law.
15 In case of any effort by way of motion, subpoena, legal action, discovery or any other
16 means to obtain any of the Protected Materials, the retaining attorney shall provide
17 notice to the counsel of record for the Designating Party of that effort with sufficient
18 time and notice so that such Designating Party can seek to protect the material, if it
19 deems necessary. It is agreed that 15 days’ notice shall be the minimum time frame
20 afforded to the Designating Party to take action. The retaining attorney shall not
21 produce any such Protected Material before the expiration of 15 days’ notice, and
22 shall not produce any such Protected Material if an objection is received by such
23 retaining attorney within the 15 day time period, even in the absence of a formal
24 motion having been filed. Any party objecting to the production of the Protected
25 Material must bring appropriate legal proceedings to prevent the release or
26 dissemination of the Protected Material within 30 days from notice.

1 IT IS SO ORDERED.

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3 DATED: 4/29/2022

4 By: 
Hon. Haywood S. Gilliam, Jr.
United States District Judge
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